No. 14-990

In The
Supreme Court of the United States

STEPHEN M. SHAPIRO,
O. JOHN BENISEK, AND MARIA B. PYCHA,

Petitioners,

v.

DAVID J. MCMANUS, JR., CHAIRMAN,
MARYLAND STATE BOARD OF ELECTIONS;
AND LINDA H. LAMONE,
STATE ADMINISTRATOR OF ELECTIONS,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

BRIEF OF *AMICI CURIAE* COMMON CAUSE AND THE CAMPAIGN LEGAL CENTER, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are nonpartisan organizations committed to democracy and electoral reform.[1] The *amici* are as follows:

Amicus curiae Common Cause is a nonpartisan, grassroots, citizens organization dedicated to fair elections and making government at all levels more democratic, open, and responsive to the interests of all people. Founded by John Gardner in 1970 as a "citizens lobby," Common Cause has over 400,000 members nationwide and local chapters in 35 states. Common Cause has been a leader in the fight for open, honest, and fair elections. Common Cause has also been a leading proponent of redistricting reforms and a vigorous opponent of partisan gerrymanders and voter suppression by both political parties. Common Cause organized and led the coalitions that secured passage of the ballot initiatives that created independent redistricting commissions in Arizona and California and that secured the passage of an amendment to the Florida Constitution prohibiting partisan gerrymandering.

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[1] This *amici* brief is filed in support of petitioners with the consent of the parties. Petitioners have granted blanket consent, and a letter confirming Respondents' consent is being filed herewith in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part and that no person other than the *amici* paid for or made a monetary contribution toward its preparation and submission.

Amicus curiae The Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding voting rights. The CLC has served as *amicus curiae* or counsel in voting rights and redistricting cases in this Court, including *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Bartlett v. Strickland*, 556 U.S. 1 (2009); and *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), among others. The CLC has a demonstrated interest in voting rights and redistricting law.

SUMMARY OF THE ARGUMENT

Petitioners Steven Shapiro, John Benisek, and Maria Pycha filed a constitutional challenge to Maryland's 2011 congressional apportionment statute, alleging a violation of their rights guaranteed by the First Amendment. The allegations of the complaint presented a valid federal claim that the 2011 apportionment by the Maryland legislature violated the First Amendment by discriminating against Republican voters in the sixth congressional district, in which Benisek resides, because of their political party affiliations and their voting histories in favor of Republican candidates for Congress.

In 2011, Democrats controlled large majorities in both houses of the Maryland legislature and the governorship. In the wake of the 2010 census, the legislature enacted sections 8-701 through 8-711 of Maryland's Election Code, gerrymandering the sixth congressional district to make it impossible for the Republican incumbent to be reelected. The apportionment statute "packed" the district with 33,000 new Democratic voters and "cracked" the Republican majority in the district by removing 66,000 registered Republican voters and disbursing them into surrounding uncompetitive districts. Prior to the 2011 gerrymander, registered Republicans outnumbered registered Democrats in the sixth district by a 12-point margin; as a result of the 2011 apportionment, registered Democrats outnumbered registered Republicans in the new sixth district by an 11-point margin. The results were predictable: a Democratic challenger defeated the Republican incumbent in the 2012 general election and was reelected to the House in 2014. The Republican share of representation in the House was cut in half, from two members to one member of the eight-member Maryland delegation.

John Benisek voted in Maryland's sixth congressional district as a registered Republican. Petitioners alleged that Maryland had reapportioned the sixth district, among others, in a manner that targeted and penalized Benisek and other Republican voters in that district because of their political views in a manner that diminished the value of Benisek's vote in congressional elections and ensured that he and other

Republican voters could no longer elect their preferred candidate in the House of Representatives. Petitioners requested a three-judge court to adjudicate the claims – including the First Amendment claim – alleged in their *pro se* complaint.

The single-judge district court determined three judges were not required and dismissed petitioners' First Amendment claim for want of subject-matter jurisdiction after concluding that the claim was legally insufficient under Rule 12(b)(6). The district court relied on *Duckworth v. State Administration Board of Election Laws*, 332 F.3d 769, 772–73 (4th Cir. 2003), for the rule "that where a plaintiff's pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court." (Pet. App. 7a–8a (internal quotation marks omitted).) In the district court's estimation, the "substantial question standard" for purposes of determining the existence of federal-question jurisdiction and "the legal sufficiency standard" for the dismissal of a complaint under Rule 12(b)(6) "are one and the same." (*Id.* 7a (internal quotation marks omitted).) The Fourth Circuit summarily affirmed "for the reasons stated by the district court." (*Id.* 2a.)

This Court must reverse for two reasons. First, the *Duckworth* rule is an aberration unique to the Fourth Circuit. It is flawed, both legally and logically, and conflicts with the controlling decisions of this Court. Jurisdiction over a claim is a threshold issue that must be decided before a court determines the

merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998). The Fourth Circuit's rule conflates a standard to determine federal-question jurisdiction with the standard to determine whether a complaint, over which a federal court has jurisdiction, is dismissible on the pleadings for failure to state a claim. The petitioners' complaint stated, at the least, an arguable claim of viewpoint-based discrimination under the First Amendment, invoking the jurisdiction of the single-judge court. Once jurisdiction attached, 28 U.S.C. § 2284(b) prohibited the single-judge court from deciding the merits of petitioners' claim and required three judges to "hear and determine" it.

Second, even if Rule 12(b)(6) were applicable, the facts alleged in the complaint stated a valid claim of viewpoint-based discrimination under the First Amendment and should not have been dismissed on the pleadings. This Court has recently found that "[p]artisan gerrymanders . . . [are incompatible] with democratic principles," many of which sound in the guarantees of the First Amendment. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2657 (2015) (second alteration original). The First Amendment requires that government maintain a posture of strict neutrality in matters of religious and political affiliations and beliefs by prohibiting the organs of government, including state legislatures, from targeting the adherents of a particular religious or political view for disfavored treatment. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality). If the Maryland legislature had

apportioned the sixth district to remove Catholic voters in order to create a Protestant majority and ensure the election of a Protestant to Congress, this Court would not hesitate to hold that the First Amendment had been violated. The First Amendment likewise prohibits a state legislature from allocating electoral power based on the political affiliations and voting histories of voters in a particular district. As Justice Kennedy explained in *Vieth v. Jubelirer*:

> The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering . . [that contravene] the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. . . . Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest. . . . First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a . . . voter['s] representational rights.

541 U.S. 267, 314–15 (2004) (Kennedy, J., concurring) (internal citations omitted); *accord League of Latin Am. Citizens v. Perry ("LULAC")*, 548 U.S. 399,

461–62 (2006) (Stevens, J., concurring in part and dissenting in part) (finding not only that the First Amendment protects "citizens from official retaliation based on their political affiliation," but also that the state redistricting at issue "was entirely inconsistent with [this] principle[ ].").

Each of the lower courts' errors is encompassed within the grant of *certiorari* and is squarely before the Court.[2] Accordingly, this Court should reverse and

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[2] This Court granted *certiorari* to decide whether "a single-judge district court [may] determine that three judges are not required to hear an action that is otherwise covered by 28 U.S.C. § 2284(a) on the ground that the complaint fails to state a claim under Rule 12(b)(6)." (Pet. at i.) The single-judge court's decision that petitioners' First Amendment claim was insubstantial and thus dismissible for want of jurisdiction was predicated on its determination that the claim was legally insufficient under Rule 12(b)(6). Because petitioners' amended complaint stated a claim under the First Amendment for which relief can be granted, however, that claim was *necessarily not* insubstantial. Thus, the question whether the district court correctly concluded that three judges were not required *because* petitioners failed to state a claim under the First Amendment "fairly include[s]" the question whether petitioners stated a claim under the First Amendment. Accordingly, pursuant to Supreme Court Rule 14.1(a) and this Court's decisions under that rule, the latter question that the lower courts determined to ground their holding is properly before this Court. *Compare Yee v. City of Escondido*, 503 U.S. 519, 536–37 (1992) (holding that whether an ordinance effects a regulatory taking is not "fairly included" in the wholly separate question of whether it effects a physical taking), *with Procunier v. Navarette*, 434 U.S. 555, 559–60 n.6 (1978) (holding that the predicate question whether the Constitution protected a prisoner's mailing privileges was "fairly comprised" in the question of whether the petitioner stated a

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remand with instructions to convene a three-judge court.

ARGUMENT

I. THE FOURTH CIRCUIT CONFLATED THE LEGAL STANDARD FOR DETERMINING THE EXISTENCE OF SUBJECT-MATTER JURISDICTION OVER A CLAIM WITH THE STANDARD FOR DETERMINING WHETHER THE CLAIM IS DISMISSIBLE UNDER RULE 12(B)(6).

The Fourth Circuit's rule that "the substantial question" standard for determining the existence of federal-question jurisdiction under 28 U.S.C. §§ 1331 and 2284 is "one and the same" as "the legal sufficiency standard" for dismissing a case under Rule 12(b)(6) is legally and logically flawed. It is legally flawed because less is demanded to establish federal-question jurisdiction than to state a valid claim on the merits. *Compare Bell v. Hood*, 327 U.S. 678, 682–85 (1946) (Black, J.), *with id.* at 685 (Stone, C.J., dissenting); *see also Baker v. Carr*, 369 U.S. 186,

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cause of action under 42 U.S.C. § 1983); *see generally* STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE § 6.25(g) (10th ed. 2013). Moreover, because the lower courts directly "passed upon" the issue of whether petitioners' complaint stated a claim under the First Amendment that issue is reviewable by this Court. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330 (2010); *United States v. Williams*, 504 U.S. 36, 41 (1992).

199–201 (1962); *Swafford v. Templeton*, 185 U.S. 487, 493 (1902). The Fourth Circuit's rule is also logically flawed because it assumes that all complaints that fail to state a valid claim on the merits are *ipso facto* "insubstantial" and can also be dismissed for want of jurisdiction. While it is true that all "insubstantial" complaints necessarily fail to state a claim on which relief can be granted, it does not follow (nor is it true) that all complaints that fail to state a claim are "insubstantial" and thus dismissible for want of jurisdiction.

A. Jurisdiction Is A Threshold Question That Does Not Depend On The Validity Of Petitioners' First Amendment Claims.

A federal court lacks the power to "rule on the merits of a case without first determining that it has . . . subject-matter jurisdiction." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007) (internal quotations omitted). Jurisdiction is "a matter for threshold determination [that, in part,] turn[s] on whether the question [is] too insubstantial for consideration." *Hagans v. Lavine*, 415 U.S. 528, 538–39 (1974).

To invoke the subject-matter jurisdiction of the federal courts under 28 U.S.C. § 1331, a complaint must allege a not insubstantial claim that a plaintiff's rights under the Constitution or laws of the United States have been violated. "'A claim is insubstantial only if . . . [there is] no room for the inference

that the questions sought to be raised can be the subject of controversy.'" *Hagans*, 415 U.S. at 538 (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973)).

"It is firmly established . . . that the absence of a valid (*as opposed to arguable*) cause of action does not implicate subject-matter jurisdiction." *Steel Co.*, 523 U.S. at 89 (emphasis added); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933); *Swafford*, 185 U.S. at 493. Thus, to invoke the subject-matter jurisdiction of a federal court, it was not necessary that petitioners' complaint allege a legally valid claim under the Constitution or laws of the United States that would survive a motion to dismiss under Rule 12(b)(6). Rather, it was only necessary that petitioners' complaint alleged an "arguable" claim that "can be the subject of controversy" under the First Amendment. *See Steel Co.*, 523 U.S. at 89; *Hagans*, 415 U.S. at 538.

As this Court's decision in *Swafford v. Templeton* illustrates, a federal court's jurisdiction over a complaint does not depend on whether it states a claim upon which relief can be granted. 185 U.S. at 493. There, the plaintiff alleged that his constitutional right to vote for a member of Congress had been violated. *Id.* at 492. The circuit court in *Swafford* made exactly the same mistake as the lower courts did in this case: It dismissed the complaint for want of jurisdiction because it thought that the complaint failed to state a cause of action. *Id.* This Court reversed, holding:

> It is obvious . . . that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. *But as the very nature of the controversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States.*

Id. at 493 (emphasis added).

Similarly, in *Bell v. Hood*, the petitioners filed a complaint seeking damages against agents of the Federal Bureau of Investigation for alleged violations of the Fourth and Fifth Amendments. 327 U.S. at 679–80. The respondents moved to dismiss for failure to state a claim. *Id.* at 680. The district court *sua sponte* dismissed for lack of jurisdiction, and the court of appeals affirmed on that ground. *Id.* Before this Court, the respondents argued that the suit was properly dismissed for want of jurisdiction because the petitioners did not state a claim, as neither the constitutional amendments at issue, nor federal statute, had provided for a remedy for monetary damages. *Id.* at 680–81.[3] This Court held, however,

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[3] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was not decided until 1971.

that this contention was "not decisive on the question of jurisdiction of the federal court," *id.* at 681, because "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover," *id.* at 682.

These precedents show that a federal court has federal-question jurisdiction when a complaint presents an arguable federal controversy, not only when it states a valid federal claim. Once the district court acquires subject-matter jurisdiction of a federal claim, that jurisdiction does not evaporate or cease to exist *nunc pro tunc* if the court later determines that the claim is meritless and subject to dismissal under Rule 12(b)(6).

B. If A Constitutional Challenge To A Congressional Apportionment Is Substantial, A Single Judge May Not Dismiss It For Want Of Jurisdiction, And Three Judges Are Required To "Hear And Determine" Its Merits.

28 U.S.C. § 2284 requires that *all* cases in which the constitutionality of a congressional apportionment is challenged cannot be decided by a single district judge who would otherwise have jurisdiction but must "be heard and determined" by a three-judge court. 28 U.S.C. § 2284(b); *see also id.* § 2284(b)(3) (stating that "[a] *single judge shall not . . . enter judgment on the merits.*") (emphasis added). If the complaint alleges an "arguable" claim that the

congressional apportionment is unconstitutional, then the district judge to whom the case is initially assigned cannot dismiss the complaint for failure to state a claim. In that event, three judges are required to "hear and determine" the claims on the merits. Conversely, if a claim is insubstantial, a single-judge district court may dismiss it for want of jurisdiction and, on that basis, determine that three judges are not required. *Goosby*, 409 U.S. at 518; *see also Gray v. Sanders*, 372 U.S. 368, 370 (1963); *Ex parte Poresky*, 290 U.S. 30, 32 (1933) (per curiam).

As this Court explained in *Goosby*, "constitutional substantiality" for purposes of 28 U.S.C. § 2284 "has been equated with such concepts as essentially fictitious, wholly insubstantial, obviously frivolous and obviously without merit." 409 U.S. at 518 (internal quotations omitted). These limiting words have "cogent legal significance," meaning that a constitutional challenge to a congressional apportionment is insubstantial "only if the prior decisions [of this Court] inescapably render the claims frivolous . . . and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Id.* (internal quotations omitted).

It follows that a complaint which alleges, as does the complaint in this case, an "arguable" claim that the apportionment of congressional districts in Maryland violated the First Amendment invokes the subject-matter jurisdiction of the federal courts. No decision of this Court has ever inescapably held that the First Amendment affords no protection against

discriminatory state apportionment statutes; to the contrary, at least three Justices of this Court have found that partisan gerrymanders can implicate the guarantees of the First Amendment. *See LULAC*, 548 U.S. at 461–62 (Stevens, J., concurring in part and dissenting in part); *Vieth*, 541 U.S. at 314–15 (Kennedy, J., concurring). Petitioners' allegations were therefore sufficient to give the district judge to whom the case was assigned jurisdiction; thereafter, 28 U.S.C. § 2284(b) limited the judge's power to "hear and determine" the merits of petitioners' First Amendment claim only as a member of a three-judge court.

C. Once Jurisdiction Attached, 28 U.S.C. §§ 2284 (b) And (c) Precluded The Single-Judge District Court From Deciding Whether Petitioners' Complaint Stated A Valid Claim Under The First Amendment.

Only a three-judge district court has jurisdiction to "hear and determine" the merits of a constitutional challenge to a congressional apportionment statute, 28 U.S.C. § 2284(b), and a "single judge shall not . . . enter judgment on the merits" of such a challenge, *id.* § 2284(b)(3); *see also Goosby*, 409 U.S. at 518; *Ex parte Poresky*, 290 U.S. at 31 (finding that if the court has jurisdiction "a single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the merits might be").

The district court exceeded the limits on its authority imposed by 28 U.S.C. §§ 2284(b) and (c) when it decided that the petitioners' complaint failed to state a claim under the First Amendment and dismissed for lack of jurisdiction. The district court was not permitted to bypass the limits § 2284 set on its power by couching as "jurisdictional" a determination of the merits of a constitutional challenge to a congressional apportionment. *See Goosby*, 409 U.S. at 522 n.8 (reversing the appellate court's jurisdictional ruling on substantiality because it "implie[d] an adjudication of the merits of petitioners' constitutional contentions.").

II. PETITIONERS STATED A VALID CLAIM THAT MARYLAND'S 2011 CONGRESSIONAL APPORTIONMENT STATUTE VIOLATED THE FIRST AMENDMENT.

Petitioners' challenge to Maryland's 2011 apportionment statute not only presents an "arguable" federal controversy, but also states a valid claim under the First Amendment for which relief can be granted. The lower courts' finding of insubstantiality was error for this stronger reason.

The lower courts' determination that petitioners' challenge to the apportionment of Maryland's congressional districts failed to state a claim was based on an unacceptably narrow view of the scope of the protection afforded by the First Amendment. The district court ruled that petitioners' First Amendment

rights were not violated because "nothing about the congressional districts at issue in this case affects in any way [their] ability to participate in any of the Maryland congressional districts in which they might find themselves" because "[t]hey are free to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives." (Pet. App. 20a–21a.)

The First Amendment guarantees to petitioners much more than the lower court recognized. It is not necessary, as the district court ruled, that an apportionment statute *deny entirely* a person's right to join a political party or cast a ballot before the First Amendment is violated. The First Amendment protects against all forms of government discrimination based on political viewpoint as reflected by a person's party affiliation or voting history. Accordingly, these guarantees are trampled after a majority party in a state legislature uses its power to reapportion congressional districts in a way that penalizes certain individuals whose political views it disfavors and draws them into districts, in which they can still vote, but in which their votes could not affect the outcome of the election.

The First Amendment protects the right "to participate in electing our political leaders," *McCutcheon v. Fed. Elec. Comm'n*, 134 S. Ct. 1434, 1440–41 (2014), by guaranteeing "the freedom of speech," "the right of the people peaceably to assemble," and the right to "petition the Government for a redress of grievances,"

U.S. Const. amend. I. The right to vote in federal elections is protected by these guarantees. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7 (1983) (holding that "impact of candidate eligibility requirements *on voters*" implicated rights protected by the First Amendment) (emphasis added). The First Amendment also guarantees the right not be discriminated against because of one's political viewpoint and the right not to be penalized because of an affiliation with a political party. *See, e.g.*, *Elrod*, 427 U.S. at 356–57. Partisan gerrymanders offend each of these core guarantees by diminishing the power of a person's vote *because* of his or her political affiliation.

A. Partisan Gerrymanders Supplant The Right Of Persons To Choose Their Representatives In Congress And Trivialize The Significance Of The First Amendment.

The right "to participate in electing our political leaders" is basic to our democracy. *McCutcheon*, 134 S. Ct. at 1441. The right to vote for members of Congress is at the heart of the First Amendment and Article I, Section 2. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Partisan gerrymanders abridge that right and "'[are incompatible] with democratic principles.'" *Ariz. State Legislature*, 135 S. Ct. at 2658 (alteration original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality)). Through gerrymandering, a State attempts to so

control the people's constitutionally-conferred right to choose their representatives as to displace that choice with the State's own preference. Gerrymanders are not only profoundly anti-democratic; they are unconstitutional.

The Constitution creates and guarantees a democracy in which members of Congress are chosen by "the People," not by the state legislatures. U.S. Const. art. I, § 2, cl. 1; U.S. Const. amend. XVII. Because election procedures are required to enable "the People" to choose their representatives, the Constitution, through the Elections Clause, grants States the power to design those procedures. U.S. Const. art. I, § 2, cl. 1; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995).

The Elections power is not absolute, however. It is limited in scope, and is only "a grant of authority to issue procedural regulations, and *not . . . a source of power to dictate electoral outcomes.*" *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (emphasis added). It is also subject to limits imposed by other provisions of the Constitution, including the First Amendment. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (citing *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989)); *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The limits on the Elections power were recognized from the beginning. At the Federal Convention, Madison asserted "that the Legislatures of the States ought not to have the uncontrolled right of regulating the times places & manner of holding elections."

2 RECORDS OF THE FEDERAL CONVENTION 240 (Max Farrand ed., rev. 1966). The Framers anticipated that the State legislatures "would take care so to mould their regulations as to favor the candidates they wished to succeed," and that "[i]t was impossible to foresee all the abuses that might be made of the discretionary power." *Id.* at 240–41; *see also generally Vieth*, 541 U.S. at 274–75 (plurality) (discussing gerrymandering before and at the time of the Framing).

Article I, Section 2 and the Seventeenth Amendment limit the Elections power. The Constitution confers the power to choose members of Congress on the people, not the state legislatures. U.S. Const. Art. I, § 2, cl. 1; U.S. Const. amend. XVII; *see also Ex parte Yarbrough*, 110 U.S. 651, 663–64 (1884). This principle abides in the bedrock of our constitutional structure. *U.S. Term Limits*, 514 U.S. at 783 (It is a "fundamental principle of our representative democracy, . . . that the people should choose whom they please to govern them.") (internal quotation omitted). It is the beginning of republican liberty. *Ariz. State Legislature*, 135 S. Ct. at 2674–75 ("The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." (quoting THE FEDERALIST NO. 37 (James Madison))). And it is evinced by one of the first choices at the constitutional convention that the people, not the state legislatures, would choose the Members of the House of Representatives, unlike the

Senate, which would be chosen by the state legislatures. *See generally* 1 RECORDS OF THE FEDERAL CONVENTION, at 48, 132 (Max Farrand ed., rev. 1966). As a matter of first principle, state legislatures lack the power to skew, much less supplant, the people's choice of their representatives in the national government. *See Cook*, 531 U.S. at 523 (finding that the Elections Clause is not "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints" (internal quotations omitted)); *U.S. Term Limits*, 514 U.S. at 841 (Kennedy, J., concurring) (finding "beyond dispute, that . . . the National Government is, and must be, controlled by the people *without collateral influence by the States*") (emphasis added).

The First Amendment also limits the power of a state legislature to enact elections regulations that seek to influence the people's choice of their congressional representatives. *See Cook*, 531 U.S. at 530–31 (Rehnquist, J., concurring in judgment) (finding that First Amendment barred states from seeking to influence election outcomes by placing information about candidates' positions on ballot). A central purpose of the First Amendment is to enable and inform the choice of political representatives. *See Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (finding that

"freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth"); *see generally* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 17–25, 76–96 (2015); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948) ("The principle of the freedom of speech . . . is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."). Just last term, this Court declared that the First Amendment "helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). State regulations that displace or bias the people's choice of their representatives in Congress preclude the public's "electoral mandate" and, therefore, abridge the First Amendment right to participate in electing our political leaders and trivialize its protections of political speech.

Partisan gerrymanders are nothing less than state attempts to bias, if not dictate, the people's choice of their representatives in Congress. As such, they exceed both the grant of power conferred on states by the Elections Clause, *see Cook*, 531 U.S. at 523, and the limits imposed by the First Amendment, *id.* at 530–31 (Rehnquist, J., concurring in judgment). States may not determine the choice of the people's representatives in the House of Representatives

without exceeding those limits. The choice of national representatives was reserved to the people at the constitutional convention. State legislatures may not undermine that foundational decision through an *ultra vires* exercise of the power granted by the Elections Clause.

For these reasons, this Court has enforced the limits of state exercise of the elections power to reapportion congressional districts. In *Wesberry v. Sanders*, this Court held that partisan gerrymanders that resulted in congressional districts with unequal populations violate Article I, Section 2, which entails "one person, one vote" and makes "equal representation for equal numbers of people the fundamental goal." 376 U.S. 1, 18 (1964). "The doctrine of 'one person, one vote' originally was regarded as a means to prevent discriminatory gerrymandering since 'opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts.'" *Davis v. Bandemer*, 478 U.S. 109, 168 n.5 (1986) (Powell, J., concurring) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 n.4 (1969)).

Wesberry ameliorated – but did not eradicate – impermissible state control over the people's choice of their national representatives. "Advances in computer technology achieved since the doctrine [of one person, one vote] was announced have drastically reduced its deterrent value by permitting political cartographers to draw districts of equal population that intentionally discriminate against cognizable groups of voters." *Davis*, 478 U.S. at 168 n.5 (Powell,

J., concurring). Thirty years have only confirmed Justice Powell's observation. State legislatures can craft congressional districts to preordain electoral outcomes. *See, e.g.*, *LULAC*, 548 U.S. at 411–13. The methods that States now use to gerrymander congressional districts, though observing the equal apportionment requirements of Article I, Section 2, directly implicate other constitutional guarantees. The methods by which gerrymanders are now achieved most poignantly offend the core protections of the First Amendment.

B. The First Amendment Furnishes A Right Against Partisan Gerrymanders That Discriminate According To Viewpoint.

The First Amendment limits regulations that subject voters to disfavored treatment *because* the State favors or disfavors a particular political viewpoint, candidate, or party. It's easy to see why. No court would entertain the thought that a State could use its Elections power to intentionally favor certain religious views over others. *See Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) (finding that "the First Amendment enjoins the employment of organs of government for essentially religious purposes."). A state legislature could not apportion legislative districts to ensure the election of a Catholic because the state favors Catholicism's views on abortion or climate change. Analogously, a state may not bias the election of a member of a

political party because it favors (or disfavors) the views of party members about, for example, abortion or climate change. The First Amendment protects the freedom of conscience to author one's own view of the right and the good, be it religious or secular, and to support that view in the democratic contest. A state may no more influence the outcome of elections to favor a religious view than to favor a political view. Each constitutes impermissible viewpoint-based discrimination. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *cf. Williams*, 393 U.S. at 30 (holding Ohio ballot restrictions unconstitutional because they unequally burdened the First Amendment rights of voters who supported minor parties); *Am. Party of Tex. v. White*, 415 U.S. 767, 795 (1974) (holding Texas law limiting absentee ballots to only the two major parties discriminatorily burdened the First Amendment rights of a minor party that had secured a candidate on the general ballot).

Viewpoint-based discrimination is anathema to the First Amendment, and the prohibition of such discrimination unites much First Amendment jurisprudence. States may not prescribe what is orthodox in politics. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Nor may states distort the "free trade in ideas," *see Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), by selecting among viewpoints in the public fora and requiring those it favors or burdening those it disfavors, *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the

government may not regulate speech based on . . . the message it conveys."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility – or favoritism – towards the underlying message expressed."); *id.* at 430–31 (Stevens, J., concurring) (internal citations omitted) (finding that viewpoint discrimination "requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue"). The First Amendment's prohibition on viewpoint-based discrimination supplies the rationale for subjecting content-based speech regulations to strict scrutiny, *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2222 (2015) (Kagan, J., concurring in judgment), and applies even when the activity being burdened is not independently protected by the Amendment's guarantees, *see, e.g.*, *R.A.V.* 505 U.S. at 391–92 (holding First Amendment proscribes special limitation on fighting words, which are unprotected speech, that express a particular viewpoint). This paramount First Amendment concern arises across a variety of state actions; unites this Court's decisions about election regulations, time, place, and matter restrictions, and political patronage; and, accordingly, is implicated by partisan gerrymanders.

First, the prohibition on political gerrymanders that discriminate according to viewpoint is reflected by the standard this Court has applied to review other First Amendment challenges to election regulations. In *Burdick v. Takushi*, this Court recognized

that all election laws invariably impose some burden on individual voters and has subjected such laws to different levels of scrutiny depending on the nature and relative severity of the burden alleged. 504 U.S. at 434. If the election regulation imposes only "reasonable, *nondiscriminatory* restrictions 'upon the First and Fourteenth Amendment rights of voters,'" the restriction is subject to a sliding scale under which a severe burden is subject to strict scrutiny, and the level of scrutiny declines in proportion to the severity of the burden. A "State's important regulatory interests are generally sufficient to justify" a "reasonable, *nondiscriminatory* restriction." *Id.* (emphasis added) (citing *Anderson*, 460 U.S. at 788). Conversely, if the regulation is discriminatory or politically non-neutral, then it "must be narrowly drawn to advance a state interest of compelling importance." *Id.* (internal quotation omitted); *see id.* at 438 (holding that strict scrutiny was not the appropriate standard to evaluate Hawaii's ban on write-in ballots because the restriction was "politically neutral" and not "content based").[4]

Second, to the extent that reapportionment statutes regulate the "time, place, and manner" of

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[4] *Burdick*'s bifurcated standard of scrutiny is also a recurring theme in First Amendment jurisprudence as applied to exercises of the Elections power: laws that incidentally burden activity protected by the First Amendment are subject to less scrutiny than laws that purposefully do so. *Compare Burdick*, 504 U.S. at 434, *with Emp't Div. v. Smith*, 494 U.S. 872, 878 (1990), *and United States v. O'Brien*, 391 U.S. 367, 377 (1968).

activity protected by the First Amendment, the prohibition on viewpoint-based discrimination also informs this Court's review. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980) (internal quotation omitted) (finding that when a time, place, and manner regulation "is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views"); *cf. O'Brien*, 391 U.S. at 377 (holding regulation that incidentally burdens protected activity is justified if, *inter alia*, "the governmental interest is unrelated to the suppression of free expression"). This Court has scrutinized "place" regulations – including regulations of the location of prurient theaters – to determine if the state intended to disfavor the messages expressed therein. *See, e.g., Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986) (finding that zoning ordinance circumscribing the permissible locations for peep-show theaters (thereby "packing" them) was a permissible time, place, and manner regulation because there was no indication that the government found the views expressed unacceptable); *Young v. Am. Mini Theatres*, 427 U.S. 50, 71 n.34 (1976) (finding that an ordinance declustering (or "cracking") peep-show theaters was a permissible time, place, and manner regulation because the zoning ordinance did not attempt to avoid "the dissemination of 'offensive' speech"). If the guarantees of the First Amendment are implicated by state regulations that crack and pack prurient theaters, *a fortiori*, they are

implicated by state legislation that cracks and packs voters to dominate their electoral participation and to control the outcome of congressional elections.

Third, partisan gerrymanders invoke the First Amendment's guarantees because that amendment proscribes state actions that retaliate against or penalize persons because of their political affiliations. In *Elrod v. Burns*, this Court held that the First Amendment forbids government entities from dismissing non-policy employees because of their political views or partisan support. 427 U.S. at 356. The *Elrod* Court found that "[c]onditioning public employment on partisan support prevents support of competing political interests. . . . Patronage thus tips the electoral process in favor of the incumbent party." *Id.* *Elrod* reaffirmed that states may not impose burdens based on political viewpoint because that would impermissibly distort competition in the electoral process and the marketplace of political ideas. *See id.* at 357. Accordingly, *Elrod* subjected the patronage-based employment dismissals to strict judicial scrutiny. *Id.* at 363.

These different lines of First Amendment analysis show that congressional reapportionment statutes must not target certain views for disfavored treatment. Like any election regulation, congressional apportionment statutes must be non-discriminatory. *Burdick*, 504 U.S. at 434. Further, like some zoning regulations, reapportionment statutes regulate the location of activity protected by the First Amendment and, accordingly, must be scrutinized to ensure that

the state's interest is unrelated to disfavoring a specific viewpoint. *Compare Renton*, 475 U.S. at 47, *with Davis*, 478 U.S. at 166 (Powell, J., concurring) (finding that because "the contours of a voting district powerfully may affect citizens' ability to exercise influence through their vote, district lines should be determined in accordance with neutral and legitimate criteria . . . [and] the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation.").

Partisan gerrymanders cannot avoid such scrutiny; they constitute viewpoint-based discrimination *par excellence*. Like the patronage-based dismissals considered in *Elrod*, partisan gerrymanders assign cognizable burdens on persons *because* of their political views. The brunt of the burden is the same basic, cognizable injury that this Court has recognized in the past: diminution of voting power. While gerrymanders allow persons to cast ballots, they discriminatorily diminish the value of that vote and thereby harm protected activity. *Cf. Gray*, 372 U.S. at 380 (holding that, even though urban voters could vote in primary elections for statewide office, the county-unit method for counting those votes unconstitutionally diminished the "true weight" of their votes); *Smith v. Allwright*, 321 U.S. 649, 658–60 (1944) (holding that, even though black Texans could cast ballots in general elections, Democratic party qualifications that prevented their primary votes for Democratic candidates in primary elections abridged the right to vote). The bare vote dilution, however, is not the whole of

the injury. Political gerrymanders dilute the power of individuals to participate in the electoral process *because* of their political viewpoint as reflected by their party affiliation and voting history. Such discrimination offends the First Amendment.

Partisan gerrymanders also offend the First Amendment by impermissibly distorting the electoral process and the marketplace of ideas. These are also cognizable harms against which the First Amendment guards. *See Williams*, 393 U.S. at 32. If the First Amendment limits state employment decisions based on partisan support because of their distorting effects on the political process, *a fortiori*, it limits state legislatures from configuring districts for the election for congressional representatives based on persons' party affiliations to influence the outcome of the elections in those districts. The distortions on the electoral process caused by districts drawn according to the viewpoints of persons residing therein are far more direct and profound than those that troubled the *Elrod* Court.

The distortions caused by partisan gerrymanders are legion and "obvious." *See Vieth*, 541 U.S. at 361 (Breyer, J., dissenting). Partisan gerrymanders contribute to the decline in competition for congressional seats when they protect incumbents. Thomas E. Mann, *Polarizing the House of Representatives*, in RED AND BLUE NATION? 280 (Pietro S. Nivola and David W. Brady, eds., 2006). They also render primary elections decisive. THOMAS E. MANN AND NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS 46 (2012).

Thus, they tie the democratic debate close to the party line, subsidizing particular viewpoints in the trade of ideas. *See* THOMAS E. MANN AND NORMAN J. ORNSTEIN, THE BROKEN BRANCH 230 (2008). Partisan gerrymanders also distort the accountability and responsiveness of congressional representatives to their constituency as a whole, as members of Congress are incentivized to over-privilege those views and constituents that are most helpful in the primary elections. *See* Samuel Issacharoff and Jonathan Nagler, *Protected From Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 Ohio St. L. J. 1121, 1131 (2007). Further, because congressional redistricting requires Representatives to rely on their fellow partisans in the state legislatures, partisan gerrymandering reinforces political rigidity by raising the costs for a Representative otherwise willing to depart from party orthodoxy. MANN AND ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS at 145. And, because partisan gerrymanders preordain the outcome of elections, they dampen voter turnout.

C. A State Apportionment Of Congressional Districts That Is Based On An Individual's Political Views Or Affiliations And That Discriminatorily Diminishes The Weight Of His Or Her Vote Is Unconstitutional Unless It Is Necessary To Serve A Compelling State Interest.

To guard against these harms, the First Amendment limits the apportionment of congressional

districts based on the political affiliation or the voting history of persons residing therein. Considering *Elrod*, the *Vieth* plurality recognized that, if sustained, the First Amendment "would render unlawful *all* consideration of political affiliation in districting." 541 U.S. at 294. The *Vieth* plurality understood that conclusion as proving too much, but this concern is overstated. Under the First Amendment, a State must apportion congressional districts by looking to facially neutral factors, including "compactness, contiguity, [and] respect for political subdivisions or communities defined by actual shared interests," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), unless it can carry the burden of demonstrating that a compelling interest makes it necessary for it to consider persons' political views or voting history, *see Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). Hence, the First Amendment subjects viewpoint-based discrimination in the drawing of legislative districts to the *same* scrutiny that it subjects other state actions that discriminate according to viewpoint.

To be sure, this Court has said that politics is a permissible consideration in legislative apportionment, not subject to the scrutiny of the federal courts. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 257–58 (2001) (upholding a duopolistic gerrymander); *Gaffney v. Cummings*, 412 U.S. 735, 751–54 (1973). Such dicta, however, were tethered to equal protection challenges to partisan gerrymanders. As compared to the Equal Protection Clause of the Fourteenth Amendment, the

First Amendment affords a different set of protections, for a different set of reasons.

Constitutional scrutiny is "claim specific." *Vieth*, 541 U.S. at 294. "An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim *because the underlying rights, and consequently constitutional harms, are not comparable.*" *Id.* (emphasis added). The harm of viewpoint-based discrimination, cognizable under the First Amendment, does not present the same measurement problems as the harm alleged, and which confounded the plurality, in *Vieth*. 541 U.S. at 281–306. The First Amendment's concern with viewpoint-based discrimination is triggered by a switch, not a scale. Even a little viewpoint-based discrimination is sufficient to call for its protection. Accordingly, the First Amendment furnishes a right against viewpoint-based discrimination, and this Court's decisions articulating that right permit no conclusion other than that partisan gerrymanders contravene it.

The question is not close. In *Young* and *Renton*, this Court found that municipal ordinances regulating the location of prurient theaters implicated the protections of the First Amendment and scrutinized whether those ordinances were enacted to target the messages conveyed therein. More recently, in *Reed*, this Court subjected a small town's ordinance restricting "temporary directional signs" directing the public to a church or other event to strict judicial scrutiny because the restriction was content-based

and thus presented the "danger of censorship." 135 S. Ct. at 2229. A First Amendment jurisprudence that, to guard against viewpoint-based discrimination, would scrutinize place regulations of "peep shows" or prophylactically subject a town's "directional signage" ordinance to strict scrutiny, but which would not subject a state apportionment of congressional districts that dilutes the votes of certain individuals *because* of their political views or voting history to *any* scrutiny, has simply lost the forest for the trees.

D. Petitioners' Amended Complaint Sufficiently Alleged That Maryland's Gerrymander Diluted Petitioner Benisek's Vote And, Therefore, States A Claim Under The First Amendment Upon Which Relief Can Be Granted.

To state a First Amendment challenge to a state-created electoral district, a plaintiff must plead two elements: first, that the State created the district *based on* the political views, partisan support, or voting history of those persons residing within it, and, second, that the reapportionment caused plaintiff a cognizable, non-generalized injury.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Petitioners' *pro se* amended complaint

contains allegations that, if true, are sufficient to establish that at least four of the congressional districts created by Maryland's 2011 apportionment, codified at Maryland Code, Election Law §§ 8-701–11, were based on the political views and the voting history of the persons residing therein. (*See, e.g.*, Opp. App. 31, Pet'rs' Am. Compl., at ¶ 5 (claiming "that the structure and composition of the abridged sections constitute infringement of First Amendment rights of political association, as each of the abridged sections voted strongly Republican in the 2008 Presidential election").)

Petitioners' amended complaint also contains allegations that, if true, show that 2011 congressional reapportionment inflicts a cognizable harm – namely, the dilution of their votes for their preferred representatives in Congress. This is especially the case for petitioner Benisek, who resides in Maryland's sixth congressional district. Prior to the 2011 reapportionment, Republicans comprised 46.7% of electors; after, they comprised 33.3%. *Compare* MD. STATE BD. OF ELECTIONS, ELIGIBLE ACTIVE VOTERS ON PRECINCT REGISTER, 2010 GUBERNATORIAL GENERAL ELECTION (2010), http://www.elections.state.md.us/press_room/2010_stats/gg10_statewide.pdf, *with* MD. STATE BD. OF ELECTIONS, ELIGIBLE ACTIVE VOTERS ON PRECINCT REGISTER, 2012 PRESIDENTIAL GENERAL ELECTION (2012), http://www.elections.state.md.us/press_room/documents/PG12/PrecinctRegisterCounts/Statewide.pdf. As a result of the 2011 reapportionment, Republicans who had lived in the sixth district in 2010 could no

longer elect the representative of their choice, either in that district or in one of the adjacent districts that were dominated by Democrats. Accordingly, the 2011 reapportionment unquestionably diminished the value of petitioner Benisek's vote.

As such, petitioners, and especially petitioner Benisek, do not allege a generalized grievance.[5] Nor do they complain of an injury to Republicans statewide, as was alleged in *Vieth*. *See* 541 U.S. at 272. Rather, petitioners claim that Maryland's congressional apportionment diluted their own votes. In the case of petitioner Benisek, the Maryland legislature rendered his vote for his preferred representative effectively null by drastically changing the shape and composition of the sixth district, which had elected a Republican representative, to achieve a likely outcome that the legislature reasonably expected that Benisek and other Republican voters would disfavor.

Because the petitioners' complaint has stated a claim, it is not insubstantial, and the lower court erred.

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Partisan gerrymanders are incompatible with democratic principles. *Ariz. State Legislature*, 135

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[5] Moreover, petitioner Benisek's injury is sufficient to establish this Court's review. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (internal citation omitted).

S. Ct. at 2658. They are also incompatible with the First Amendment's prohibition on viewpoint-based discrimination, and the federal courts have jurisdiction to so hold.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the circuit court and remand with instructions to convene a three-judge district court to adjudicate petitioners' First Amendment claim.

Respectfully submitted,

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